

adopted grandsons living 21 years after the birth of Chin Yoong Kong will share in the distribution of the corpus. The exact date of birth not having been given, an enquiry will have to be made whether Chin Kee Kong who was born in 1949 comes within the period of 21 years, but this can ordinarily be done by the trustees without reference to court. Chin Fee Kong, born in 1952 and Chin Chee Kong born in 1956, are unfortunately out, but the only comfort, though a cold comfort for them, is that they are the only two of the settlor's progeny who do not benefit.

As for the 40% of the trust property to be paid to Ken Huin Kongsi in Moyang or Swatow, China, which I am given to understand is an ancestral graveyard, in the political situation now existing and having regard to the fact that no members of the settlor's family are residing in China, I think it is clear and beyond argument that the trust has failed. No one has been able to advise that the graveyard is being maintained. This portion thus falls into the residuary estate of the settlor to be distributed in accordance with the terms of the will.

I believe I have answered the questions posed in this summons. There will be a declaration for the execution of the trust as herein determined. Costs of all parties to this application to be taxed as between solicitor and client basis and paid out of the trust fund.

In conclusion, let me express my gratitude to all concerned for their assistance in this difficult determination.

Order accordingly.

Solicitors: Cheang Lee & Ong; Peh Swee Chin;
Lim Cheng Ean & Co.

DE FONSEKA v. DE FONSEKA & ORS.

[O.C.J. (Yong J.) June 4, 1971]

[Kuala Lumpur — Originating Summons No. 386 of 1970]

Wills and Trusts — Trust deed — Infant's beneficial interest of $\frac{1}{4}$ undivided share in land and house — Application by one co-owner for an order to sell whole of property and distribute proceeds to owners of respective shares — Whether court can act in direct contradiction of express terms of the trust — Trustee Ordinance, 1949, ss. 2, 26, 56 and 57.

This was an application for permission to sell the immovable property of an infant *cestui que trust* ($\frac{1}{4}$ undivided share in the land and house), contrary to the provisions of the trust deed under which the second respondent became the trustee. The applicant and the first and third respondents were the owners of the remaining undivided $\frac{3}{4}$ share. This application was not made by the trustee of the infant's property nor by a person beneficially interested under the trust. It was made by the eldest brother of the infant and one of the co-owners of the land who was anxious to sell his $\frac{1}{4}$ share. He wanted to sell the whole piece of land at a price of "not less than \$35,000" and the proceeds distributed to the owners of the respective shares. He also wanted the infant's share of the proceeds to be held by him jointly with the infant's mother and trustee until the infant reaches the age of 21 years.

The question in issue was whether the court could act in direct contradiction of the express terms of the trust.

A Held, dismissing the application: (1) as a general rule, the court would give effect to the intentions of the author of the trust as expressed in the trust instrument and would not arrogate to itself any jurisdiction or overriding powers to disregard or re-write the trust;

(2) there was no provision in the trust instrument nor was there any order of court directing the infant's land to be sold. The trust instrument expressly required the land to be transferred to the infant and directed it to be registered in her name on her attaining the age of majority;

B (3) the power conferred by section 26 of the Trustee Ordinance, 1949, applies only so far as a contrary intention is not expressed in the trust instrument and has effect subject to the provisions expressed therein. Thus, the instant application did not fall within the four corners of section 26 because a contrary intention was expressed in the trust deed.

C Observations on powers of court to vary express terms of a trust instrument.

Cases referred to:-

(1) *Johnstone v. Baber* 8 Beav. 233; 50 E.R. 91.

(2) *D'eyncourt v. Gregory* (1876) 3 Ch. D. 635.

(3) *In re Crawshaw* 60 L.T.R. 357.

(4) *In re Morrison* [1901] 1 Ch. 701.

D (5) *In re New* [1901] 2 Ch. 534.

(6) *In re Tollemache* [1903] 1 Ch. 955.

(7) *Chapman v. Chapman* [1954] A.C. 429.

(8) *In re Chapman's Settlement Trusts* [1953] 1 Ch. 218.

ORIGINATING SUMMONS.

V. Manuel for the applicant.

E Other parties unrepresented at the hearing.

Cur. Adv. Vult.

Yong J.: This is an application for permission to sell the immovable property of an infant *cestui que trust* ($\frac{1}{4}$ undivided share in the land and house), contrary to the provisions of the trust deed under which **F** the second respondent became the trustee. The applicant and the first and third respondents are the owners of the remaining undivided $\frac{3}{4}$ share.

It must be pointed out that this application was not made by the trustee of the infant's property nor by a person beneficially interested under the trust. It was made by Eric William Anthony De Fonseca the eldest brother of the infant and one of the co-owners of the land who is anxious to sell his $\frac{1}{4}$ share. Under the National Land Code he is entitled to sell his own share separately, to a purchaser of his own choice and at a price of his own volition. For reasons best known to himself he now applies to sell the infant's share as well. He wants to sell the whole piece at a price of **H** "not less than \$35,000" and the proceeds distributed to the owners of the respective shares. He also wants the infant's share of the proceeds to be held by him jointly with the infant's mother and trustee until the infant reaches the age of 21 years.

I The land is freehold situated in Petaling Jaya Gardens near the town of Petaling Jaya and has an area of nearly $\frac{1}{5}$ of an acre or 8,099 square feet. Erected on it is a large two storey brick house. The house is in good condition and fetches a monthly rental of \$350. Applicant has obtained from Mr. Marks a valuation certificate dated July 20, 1970, valuing the land at \$20,247.50, that is at the rate of only \$2.50 per square foot for land which is situated in one of

the best residential areas of Petaling Jaya and the large two storey brick house which is only 5 years old at only \$20,500 making a total of \$40,747.50. As the valuation was made by him not long after the May 13, 1969 incident it was perhaps understandable why he had valued this valuable piece of property at only \$40,747.50 and recommended its sale at \$35,000.

The applicant in his first attempt to get the court's permission to sell the infant's share, did not disclose the trust deed under which the infant's share was held nor did he disclose the fact that the trust deed requires the trustee to transfer the land to the infant on her attaining the age of majority. This matter first came before Mohamed Azmi J. who refused to grant permission to sell the infant's land unless the applicant filed an affidavit to show how the trust was created and certain other amendments were carried out by him.

The applicant then filed an amended originating summons and an affidavit showing that Cheah Siew Yoon, the trustee of the infant, had given him her consent to sell, and the first respondent to him her power of attorney to act, but his affidavit still did not disclose the trust deed nor the express directions contained therein. In Cheah Siew Yoon's affidavit a copy of the trust deed was however exhibited.

When this amended originating summons came before me, I directed that, for the protection of the infant's interest, an independent guardian *ad litem* should be appointed to represent the infant's interest. I accordingly adjourned the hearing to enable the applicant to carry out the direction.

When this application came up before me again I found that he had not carried out the court's direction and that he had not appointed an independent person to represent the infant's interest. He appointed Cheah Siew Yoon the trustee as guardian *ad litem* although she had already given him her consent to sell the infant's land, and such appointment was made without the approval of the court and is a farce. In her affidavit she did not disclose to the court the promise she had made to the author of the trust.

The relevant parts of the trust deed read:—

"I hold the said land in trust for the said Sita Anne De Fonseka absolutely and hereby agree that I will at the request of the said Sita Anne De Fonseka make such applications to the Land Registry and execute and do all such documents acts and things as may be necessary to procure the said land to be transferred to and registered in the name of Sita Anne De Fonseka or in the name of such person or otherwise dealt with at such time and in such manner as the said Sita Anne De Fonseka shall direct or appoint."

It is clear that this trust requires the trustee to transfer the land to Sita Anne De Fonseka (on her attaining the age of majority) and to register it in her name in the Registry of Titles or deal with the same as she shall direct or appoint on her attaining similar age. It is equally clear that this trust gives the trustee no power to sell the infant's land.

The question before the court is: could the court act in direct contradiction of the express terms of the trust? After examining various authorities, including the following, I came to the conclusion that the court would as a general rule give effect to the intentions of

A the author of the trust as expressed in the trust instrument and would not arrogate to itself any jurisdiction or overriding powers to disregard or re-write the trust.

In *Johnstone v. Baber*⁽¹⁾ the testator devised his advowson to trustees, to sell on the death of A. and divide the proceeds among certain persons. The court held that it had no jurisdiction to authorise a sale in the lifetime of A. although it would be beneficial to the parties.

In *D'eyncourt v. Gregory*⁽²⁾ Jessel M.R. said that the court had no jurisdiction to order a sale of heirlooms which were settled in strict settlement simply on the ground that a sale would be for the benefit of all parties interested.

In *In re Crawshaw*⁽³⁾ where an application was made for sanction of the court to approve a scheme whereby a limited company was to be formed to take over the business in which the testator was a partner, North J. held that the court had no jurisdiction to sanction such a scheme which was in no way authorised by the testator's will.

In *In re Morrison*,⁽⁴⁾ Buckley J. in holding that the court had no jurisdiction to sanction an agreement by which the executors and trustee proposed to concur in converting into a limited company a business in which their testator was a partner, whereby the testator's share in the business would be exchanged for shares and debentures in the company, said:—

"In my opinion there does not reside in this court any power to authorise trustees to take, on the ground that it is beneficial, an investment which the testator has not authorised. I therefore must refuse the application."

This principle was further discussed in *In re New*⁽⁵⁾ where Romer L.J., said:—

"As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms."

His Lordship was however of the further opinion that "in the management of a trust estate" certain emergency might arise which was

"...not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained by reason of some of them not being *sui juris* or in existence, then it may be right for the court, and the court in a proper case would have jurisdiction, to sanction on behalf of all concerned such acts on behalf of the trustees as we have above referred to."

but his Lordship was quick to limit this extraordinary jurisdiction when he said:—

"Of course, the jurisdiction is one to be exercised with great caution and the court will take care not to strain its powers ... but it need scarcely be said that the court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate; and certainly the court will not be disposed to sanction transactions of a speculative or risky character."

In the Court of Appeal case of *In re Tollemache*⁽⁶⁾ the following headnotes appear:—

"The rule laid down in *In re New* as to the exercise of the court of its extraordinary jurisdiction in relation to the

administration of trusts, in sanctioning acts by trustees going beyond the express provisions of the trust instrument is limited to cases of emergency, and does not cover every case in which a particular act is desired to be done merely because it appears beneficial to the estate. For instance, the court will not sanction an unauthorised change of investment proposed on the mere ground that it will be to the advantage of the beneficiaries."

At page 956 of the report, Vaughan Williams L.J. said:—

"It is admitted that the applicant cannot succeed unless she can bring herself within *In re New*. Putting that case shortly it is this — that a case may arise in which, in the course of the administration of an estate such an emergency may occur that it must be dealt with at once; but it cannot be said that there is any such emergency here. The appeal must therefore be dismissed."

On the same page Romer L.J. said:—

"I agree. *In re New* shows how far the court will go and beyond what point it will not go."

and Cozens-Hardy L.J. was of similar opinion when he said:—

"I agree. I will only add that, in my opinion, *In re New* constitutes the high-water mark of the exercise by the court of its extraordinary jurisdiction in relation to trusts."

In this application there is no evidence that the trustee in the management of the infant's land has been embarrassed by any emergency, which the author of the trust had not foreseen or anticipated. On the contrary, he must have foreseen or anticipated that if he were to give to his infant daughter the purchase price instead of the land the money might be frittered away or it might depreciate in value in years to come. He accordingly purchased land for her and directed that it be transferred to her and be registered in her name on her attaining the age of majority. The instant case does not therefore fall within the purview of *In re New*. Then again in the House of Lords case of *Chapman v. Chapman*⁽⁷⁾ Lord Simonds L.C. at page 446 said:—

"It is the function of the court to execute a trust, to see that the trustees do their duty and to protect them if they do it, to direct them if they are in doubt and if they do wrong, to penalise them. It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary."

Lord Oaksey was of the same view. He said:—

"The general rule is said to be that the court must see that the trusts are executed, but it is conceded that the court has no power to insist upon the execution of the trusts if the cancellation of the settlement is desired by all the parties if they are *sui juris* and the property can then be resettled upon altered trusts. Yet where infants are concerned the court cannot, it appears, sanction any alteration of the trusts under the general rule although the interests of the infants appear to demand the alteration."

I have dealt at length with the inherent jurisdiction of the court and will now deal with the statutory powers conferred by our Trustee Ordinance 1949. The relevant parts of section 56 are as follows:—

"56. (1) Where in the management or administration of any property vested in trustees, any sale, lease, charge, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the

A trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the cost of any transaction, are to be paid or borne as between capital and income.

(4) An application to the court under this section may be made by the trustees or by any of them or by any person beneficially interested under the trust."

B This section 56(1) is identical with section 57(1) of the (English) Trustee Act 1925 which has been the subject of a large number of decisions, the most important of which was in the Court of Appeal case of *In re Chapman's Settlement Trusts*⁽⁸⁾ where the headnotes read:—

C "Thirdly, per Evershed M.R. and Romer L.J. Section 57 of the Trustee Act 1925 does not confer on the court any general jurisdiction to vary beneficial trusts. The power conferred by that section in regard to 'the management or administration of any property' is confined to the managerial supervision and control of trust property on behalf of beneficiaries, and the language cannot be stretched to include any modification of equitable interests which has been created in that property."

D At page 264 Evershed M.R. said:—

"The case as presented before us on behalf of the appellants was mainly founded upon the inherent jurisdiction of the court but, in the alternative, it was submitted that the scheme was a 'transaction' within section 57 of the Trustee Act 1925, which the court, accordingly, had statutory power to authorize. In our opinion, if the court has no power under its general jurisdiction to make the order for which the appellants ask, then the order cannot be made at all. The reason for this view is that, as we have already pointed out, the alteration or remoulding as such of trusts declared by a settlement is not within the scope of section 57, which only empowers the court to make orders, if it thinks it expedient so to do, with reference to the management or administration by trustees of the trust property which is vested in them. The scheme which is proposed in the present case does not in any sense arise out of any administrative or managerial difficulty affecting the trust assets; ... Such a scheme is, accordingly, in our view clearly outside the purview of section 57, having regard to the interpretation and effect which we have attributed to the section."

On appeal⁽⁷⁾ this view was unanimously approved by the House of Lords where Lord Morton at page 466 said:—

G "For the reasons which I have set out, I fear at too great length, I am of the opinion that the court has only claimed jurisdiction to make such an alteration in the maintenance cases already mentioned, and has frequently denied that it has such a jurisdiction in any other case. In saying this I am not overlooking the 'salvage' cases, but they relate to administrative acts by trustees and not to alteration of beneficial interests.

H I agree with the majority of the Court of Appeal in their rejection of the present application, and I cannot accept Mr. Russell's argument based on the other cases which he has cited."

My attention was also drawn to section 26 of our Trustee Ordinance 1949 which reads:—

I "Where an undivided share in the proceeds of sale of land directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate, the trustees or personal representatives may (without prejudice to the trust for sale affecting the entirety of the land and the powers of the trustees for sale in reference thereto) execute or exercise any trust or power vested in them in relation to such share in conjunction with the persons entitled to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested

in any such other share, either in his or their own right or in a fiduciary capacity."

The opening words of this section clearly indicate that the "undivided share" refers to the proceeds and not to the land and that the proceeds are from the sale of land directed to be sold, presumably by the trust instrument or order of the court. In the instant case the trust instrument did not direct nor was there any order of court directing the infant's land to be sold. On the contrary the trust instrument expressly requires the land to be transferred to the infant and directs it to be registered in her name on her attaining the age of majority. In any event the power conferred by this section applies only so far as a contrary intention is not expressed in the trust instrument and has effect subject to the provisions expressed therein. In commenting on the applicability of this section 26 (English section 24), 26 *Halsbury's Statutes of England* 2nd Ed. says that:—

"The power conferred by this section applies to trusts, executorships and administratorships, whether created before or after the commencement of this Act, and is in addition to powers conferred by the instrument, if any, creating the trust but applies if and so far only as a contrary intention is not expressed in that instrument and has effect subject to the terms thereof;"

Section 2(2) of our Trustee Ordinance 1949 expressly limits that:—

"The power conferred by this Ordinance on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument."

I am therefore of the opinion that the instant application does not fall within the four corners of section 26 of the Trustee Ordinance 1949 because a contrary intention is expressed in the trust deed.

My attention was also drawn to section 57 of the Trustee Ordinance 1949. The relevant parts of subsection (1) are as follows:—

"An order under this Ordinance ... concerning any interest in land ... subject to a trust may be made on the application of any person beneficially interested in the land ... whether under disability or not or on the application of any person duly appointed trustee thereof."

In the instant case, the infant's $\frac{1}{4}$ share of the land is subject to the trust but not the applicant's share, and this application to sell the infant's land is not made by the infant who is beneficially interested nor by the trustee. Subsection (2) deals with land subject to a charge.

In my view this section 57 also does not apply to the instant application.

I am fully satisfied that in the instant case there is no evidence to show that it is a case of maintenance or salvage, nor is there any evidence to show that Cheah Siew Yoon (f) the trustee in the management or administration of the infant's land has been embarrassed by any emergency. The property is producing a gross income of \$350 per month or \$4,200 per year to which the infant would be entitled to \$87.50 per month or \$1,050 per year. If the property is sold at \$35,000 it would give to its purchaser a gross annual

A return of 12%. What better or safer investment could there be than this?

In cases of a kind like this, I do not think that I have jurisdiction, inherent or statutory, to make the order sought, and to override the express provisions of the trust as contained in the trust deed. Even if I have the jurisdiction I am of the opinion that in the circumstances of this case it would not be expedient nor would it be in the interests of the infant to convert her land into cash.

This application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Manuel & Co.*

CHIEW VUI KIET & ANOR. v. CHONG FOOK TIEN & ORS.

[F.C. (Azmi L.P. Ismail Khan C.J. (Borneo) & Yong J.)

June 11, 1971]

[Kota Kinabalu — Federal Court Civil Appeal No. 8 of 1970]

Evidence — Admissibility — Original document not produced — Whether secondary evidence admissible — Presumption — Whether arises where original document is unstamped — Evidence Ordinance (Sabah Cap. 43) ss. 65(a) and 89.

Stamps — Instruments chargeable with duty — No evidence that original was stamped — Payment of duty and penalty insufficient to admit secondary evidence — Stamp Ordinance (Sabah Cap. 137) ss. 47, 52 — Application of.

This was an action claiming an account of a partnership. The first and second respondents denied that they were partners of the firm. The crucial evidence against the first and second respondents was a partnership agreement in Chinese. The evidence showed that the original of this document was unstamped. Despite a notice to produce, the original document was not produced and the appellants produced a photostat copy of the document, which was admitted in evidence. In his judgment, however, the learned trial judge stated that he was wrong in admitting the document and he gave judgment for the first and second respondents. On appeal,

Held, dismissing the appeal: as the original document had not been stamped, no secondary evidence could be offered of its terms. If the copy of the agreement was excluded, there was no evidence to show the partnership of the first and second respondents as partners in the business.

Cases referred to:—

- (1) *Closmadeuc v. Carrel* 18 C.B. 36, 139 E.R. 1276.
- (2) *Marine Investment Company and Coffey & Ors. v. T. Snaith Haviside & Anor.* (1871-72) L.R. 5 H.L. 624 at p. 635.
- (3) *The Rajah of Bobbili v. Inuganti China Sitaramasami Garu*, L.R. (1899) 26 I.A. 262 at p. 266.
- (4) *State of Bihar v. Karam Chand Thapar & Bros. Ltd.* [1962] 1 S.C.R. 827.
- (5) *Murugayya Pillai v. Rajagopal Pillai & Ors.* A.I.R. 1942 Mad. 381.

FEDERAL COURT.

K. Raja Nayagam (W. K. Loo with him) for the appellants.